Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78- 78-573

CHARLES E. MELTON,
Petitioner,

v.

MICHAEL L. BOW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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October, 1978

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No. 78-

CHARLES E. MELTON,

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MICHAEL L. BOW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

The petitioner, Charles E. Melton, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of Georgia entered in this action on July 21, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 241 Ga. 629, ____ S.E. 2d ____ (1978). A copy of the original decision is included as Appendix A. A copy of the petitioner's motion for rehearing is included as Appendix B. The revised and final decision of the Supreme Court of Georgia as reported at 241 Ga. 629, ____ S.E. 2d ____, is included as Appendix C. The opinion of the Court of Appeals of Georgia is reported at 145 Ga. App. 272, ____ S.E. 2d ____ (1978). A copy is included as Appendix D.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered July 6, 1978, and the petitioner's motion for rehearing was denied July 21, 1978. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I. Whether a conclusive presumption of injury to the reputation of a plaintiff in a defamation per se case violates the defendant's right to due process under the Fourteenth Amendment.

II. Whether a conclusive presumption of injury to the reputation of a plaintiff in a defamation per se case denies equal protection under the Fourteenth Amendment to a non-media defendant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code § 105-701:

A libel is a false and malicious defamation of another,

expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule. The publication of the libelous matter is essential to recovery.

Georgia Code § 105-702:

Slander, or oral defamation, consists, first, in imputing to another a crime punishable by law; or, second, charging him with having some contagious disorder, or being guilty of some debasing act which may exclude him from society; or, third, in charges made against another in reference to his trade, office, or profession, calculated to injure him therein; or, fourth, any disparaging words productive of special damage flowing naturally therefrom. In the last case, the special damage is essential to support the action; in the first three, damage is inferred.[1]

Georgia Code § 38-113:

Presumptions are either of law or of fact. The former are conclusions and inferences which the law draws from given facts. The latter are exclusively questions for the jury, to be decided by the ordinary test of human experience.

Georgia Code § 38-118:

Other presumptions of law, such as of innocence, and in some cases of guilt, of continuance of life for seven years, of a mental state once proved to exist, and all similar presumptions, may be rebutted by proof.

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[1] The types of communications which are slanderous per se are, when written, libelous per se. *See, e.g., Hardy v. Williamson*, 86 Ga. 551, 557, 12 S.E. 874, 876 (1891).

STATEMENT OF THE CASE

The petitioner seeks this Court's review of a decision of the Supreme Court of Georgia upholding a damage award of $200,000 in a defamation per se case where the plaintiff was shown to have suffered no damage to his reputation. Michael Bow, the respondent herein, brought an action against the petitioner for libel and slander, asserting that the petitioner had made certain defamatory remarks. The remarks were allegedly made during the course of an investigation conducted by Dr. Melton, as head of the Chemistry Department of the University of Georgia, following a report by Bow that he had received a W-2 form for earnings as a student worker at a time when he was no longer working there.

The case was tried before a jury in February, 1977. At the conclusion of the respondent's case, Dr. Melton moved for a directed verdict based upon a defense of privilege and a failure to show actual malice. The motion was denied, and subsequently, the jury returned a verdict for $200,000 in favor of respondent. The $200,000 verdict was upheld by the Georgia Court of Appeals on February 21, 1978, and a rehearing was denied by that court on March 14, 1978.

On certiorari, the Georgia Supreme Court, despite positive, direct and uncontroverted testimony by respondent's own witnesses that the respondent continued to have an outstanding reputation at the time of trial, affirmed the decision of the Court of Appeals holding that the respondent had no burden to prove damage to his reputation as the law "conclusively presumes injury to reputation." Further, the Georgia Supreme Court held that evidence that the respondent had a good reputation could not disprove injury to his reputation. (A-3a).

The inference of injury to reputation in defamation per se cases as provided in Ga. Code § 105-702 had never before been interpreted as being conclusive or as not being susceptible to rebuttal. *See* Ga. Code §§ 38-113 and 38-118.

The petitioner therefore filed a motion for rehearing (B-1b) raising the issues presented in this petition. These constitutional issues could not have been raised before. The motion for rehearing was denied on July 21, 1978. Although the court did modify its original opinion by substituting "infers" for "conclusively presumes", it nevertheless continued to hold that evidence that the respondent had a good reputation could not disprove injury to his reputation. (C-3c), thus maintaining the substance of its original decision intact.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A CONCLUSIVE PRESUMPTION IN CONFLICT WITH THE DECISIONS OF THIS COURT.

In reaching its decision, the Georgia Supreme Court held:

> "Bow had no burden to prove that his reputation had been damaged by the statements imputing a crime to him. The law *conclusively presumes* injury to his reputation. The evidence of witnesses that Bow had a good reputation *could not disprove injury* to his reputation." [Emphasis added] (A-3a).

In denying the petitioner's motion for rehearing, the Georgia Supreme Court modified its opinion by substituting "infers" for "conclusively presumes." This change, however, was insufficient to correct the original error, as the court left standing the language that the respondent

had no burden to prove damages and, more importantly, that the evidence that the respondent had a good reputation *could not disprove injury* to reputation. (C-3c). In spite of this change, the presumption remains conclusive because it is "incapable of being overcome by proof of the most positive character." *Heiner v. Donnan*, 285 U.S. 312, 324 (1932).

This Court has declared that conclusive presumptions have long been disfavored, *Vlandis v. Kline*, 412 U.S. 441, 446 (1973), and on numerous occasions has struck down conclusive presumptions as violative of the Due Process Clause. *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926); *Hoeper v. Tax Commission*, 284 U.S. 206 (1931); *Bell v. Burson*, 402 U.S. 535 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Cleveland Board of Education v. LaFleur*, 414 U.S. 623 (1974); *Turner v. Department of Employment Security*, 423 U.S. 44 (1975).

In *Vlandis*, this Court struck down Connecticut's irrebuttable presumption that because a student was a non-resident at the time of his application for admission, he remained a non-resident for the entire duration of his enrollment. That presumption failed because it was not "necessarily or universally true in fact" and because the state had "reasonable alternative means" of making the determination. *Vlandis v. Kline*, *supra* at 452.

For the same reasons that the Connecticut statute failed, the conclusive presumption created by the Georgia Supreme Court would also fail, for it is not necessarily or universally true in fact, and other reasonable means are available for making the crucial determination of whether the plaintiff in defamation cases has actually suffered injury to his reputation. As this Court held in *Time, Inc. v. Firestone*, 424 U.S. 448, 459 (1976), involving as here libel per se, a defamation plaintiff is not entitled to recover compensatory damages without a showing of actual injury by competent evidence. Clearly then, the conclusive presumption established by the Georgia Supreme Court is not necessarily or universally true and is not the only reasonable means to show injury to a plaintiff's reputation.

As the decision of the Georgia Supreme Court provides no opportunity for a defendant in a defamation per se case to demonstrate the absence of actual injury to a plaintiff's reputation and effectively forecloses individual judicial determination of the issue, it stands squarely in conflict with the decisions of this Court. This conflict is of a magnitude serious enough to warrant the grant of certiorari to review the judgment below.

II. THE DECISION BELOW CREATES A CLASSIFICATION THAT IMPOSES AN INVIDIOUS DISCRIMINATION ON NON-MEDIA DEFENDANTS IN DEFAMATION PER SE CASES.

By virtue of the conclusive presumption created by the Georgia Supreme Court, non-media defendants in defamation cases are now put in a position where damages may be recovered against them without a showing of actual injury by the plaintiff. This position is completely contrary to that of a media defendant against whom damages may be recovered only by a showing, through competent evidence, that the plaintiff's reputation has actually been injured. *Time, Inc. v. Firestone*, *supra* at 459. As this differentiation works an invidious discrimination upon the non-media defendant, it is completely irrational and does not comport with the constitutional requirements of equal protection.

This Court has labeled as "an oddity of tort law" the common law of defamation, "for it allows recovery of purportedly compensatory damages without evidence of actual loss." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Furthermore, as it now stands in Georgia, a plaintiff may recover substantial sums in jury awards as compensation for presumed injury to reputation, when in fact, no injury has occurred. The conclusive presumption established by the Georgia Supreme Court forecloses the proper judicial determination of actual injury to reputation by disdaining "present realities in deference to past formalities," thereby "running roughshod" over the interests of defendants in such cases. *Stanley v. Illinois*, *supra* at 657.

In *Gertz*, this Court recognized that jury awards based on *presumed* injury were largely uncontrolled and that "States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of actual injury." 418 U.S. 323, at 349. State remedies for defamation are to reach "no farther than is necessary to protect the legitimate interest involved." *Id.*

Such is not the case in Georgia by virtue of the conclusive presumption established by the Georgia Supreme Court for the first time in this case. This pronouncement goes beyond merely conflicting with the decisions of this Court and rises to the level of a denial of equal protection to non-media defamation defendants. The proper resolution of these issues depends upon a grant of certiorari to review the decision below.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Georgia Supreme Court.

Respectfully submitted,

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JOHN C. JONES
Assistant Attorney General

CERTIFICATE OF SERVICE

I, MICHAEL J. BOWERS, a member of the bar of the Supreme Court of the United States and counsel for the Petitioner CHARLES E. MELTON, hereby certify that I have served three copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Georgia, by depositing same in the United States Mail, first class postage prepaid, to:

DENNIS T. CATHEY
Cathey & Strain
Post Office Box 689
Cornelia, Georgia 30531

This ____ day of October, 1978

MICHAEL J. BOWERS
Senior Assistant Attorney General

APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF GEORGIA

Decided: July 6, 1978

33658. MELTON v. BOW

JORDAN, Justice.

This court granted certiorari to review the decision of the Court of Appeals in *Melton v. Bow*, 145 Ga. App. 272 (243 SE2d 590) (1978), a case in which Michael L. Bow brought an action against Dr. Charles E. Melton for slander and libel. The jury returned a verdict for Bow in the amount of $200,000, and the Court of Appeals affirmed.

Dr. Melton had a limited privilege of communication of information about Bow in an investigation he made for the University of Georgia concerning the report made by Bow that he had received a W-2 form for earnings as a student-worker at the University at a time when he was no longer working there.

In order to claim a limited privilege under Code § 105-709, the communications must be made only to proper persons, and the privilege may not be used as a cloak for venting private malice. Code § 105-710; *Sheftall v. Central of Ga. Ry. Co.*, 123 Ga. 589 (5) (51 SE 646) (1905); *Ivins v. Louisville & Nashville R. Co.*, 37 Ga. App. 684 (8) (141 SE 423) (1927); *Veazy v. Blair*, 86 Ga. App. 721 (72 SE2d 481) (1952); *Camp v. Maddox*, 93 Ga. App. 646, 651 (92 SE2d 581) (1956).

The evidence showed that Dr. Melton made defamatory remarks and published defamatory reports about Bow to numerous persons not involved in any investigation, and that he continued to make and publish such defamatory statements after the investigation by the

University security department had disclosed that the discrepancy in the accounts had been caused by an embezzler in Dr. Melton's department. There was no evidence that Bow was guilty of any of the numerous misdeeds with which he was charged by Dr. Melton. We concur in the view of the Court of Appeals that the evidence authorized a finding that the publications were made to persons not concerned with the investigation, and that the circumstances amply authorized a finding of malice.

This court in granting certiorari was concerned with Division 3 of the opinion of the Court of Appeals, in which it was held: "Appellant [Dr. Melton] also contends that the verdict is without evidentiary support because the testimony of appellee's own witnesses showed that his reputation had not been damaged. One of Bow's witnesses twice said, '. . . he has an outstanding reputation.' This testimony, appellant argues, rebutted the presumption of damages which attached upon proof of the defamatory statements and placed on Bow the burden of proving actual damages. Assuming appellant is correct about the effect of that testimony, we still cannot find the verdict to be unsupported by the evidence. Another witness testified that when Dr. Melton accused Bow of criminal activity, '. . . it made me wonder about him.' Applying the any evidence rule stated above, we are constrained to hold in favor of the jury's verdict."

Dr. Melton in his petition for certiorari strongly argues that the testimony as to the good reputation of Bow refuted the presumption of injury to him, and that there was no evidence of injury to Bow's reputation authorizing the recovery of damages.

We reject this argument of Dr. Melton, but feel that the quoted paragraph of the opinion of the Court of Appeals is a misleading statement on the law applicable to the proof of damages in a case where false statements are made which are per se slanderous and libelous. Dr. Melton, by oral and written statements, accused Bow of the theft of hotplates from the chemistry laboratory where he had worked. He also called Bow a liar, stated that Bow was in trouble with the I. R. S., and made many other derogatory remarks about him.

To impute the crime of theft to a person is actionable per se without proof of special damages. *Roberts v. Ramsey*, 86 Ga. 432 (12 SE 644) (1890); *Weatherholt v. Howard*, 143 Ga. 41 (84 SE 119) (1914); *Harrison v. Pool*, 24 Ga. App. 587 (101 SE 765) (1919); *Ingram v. Kendrick*, 48 Ga. App. 278 (172 SE 815) (1933); *Atlanta Journal Co. v. Doyal*, 82 Ga. App. 321, 331 (4) (60 SE2d 802) (1950); *Duchess Chenilles Inc. v. Masters*, 84 Ga. App. 822, 829 (67 SE2d 600) (1951); *Davis v. Macon Telegraph Publishing Co.*, 93 Ga. App. 633 (2) (92 SE2d 619) (1956).

Bow had no burden to prove that his reputation had been damaged by the statements imputing a crime to him. The law conclusively presumes injury to his reputation. The evidence of witnesses that Bow has a good reputation could not disprove injury to his reputation. This evidence was relevant on the issue of the amount of damages, since libelous statements are certainly more injurious to the reputation of a person of good reputation than to a person of bad reputation. *Augusta Chronicle Publishing Co. v. Arrington*, 42 Ga. App. 746 (3) (157 SE 394) (1930).

We agree with the determination of the Court of Appeals

that the evidence authorized the jury verdict, but this finding should not have been placed solely on the testimony of a witness that the false statements "made her wonder" about Bow.

After further consideration of the evidence in the case, we are of the opinion that the verdict was not excessive.

Judgment affirmed. All the Justices concur.

APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF GEORGIA

CASE NO. 33658

CHARLES E. MELTON,
Petitioner

v.

MICHAEL L. BOW,
Respondent

MOTION FOR REHEARING

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IN THE SUPREME COURT OF GEORGIA

CHARLES E. MELTON,
Petitioner

v.

MICHAEL L. BOW,
Respondent

CASE NO. 33658

MOTION FOR REHEARING

Charles E. Melton, Petitioner in the instant case, files this motion for rehearing on July 14, 1978, during the term in which the decision by this Court was rendered and within ten days of the rendition of said decision on July 6, 1978.

The Petitioner respectfully moves this Court to grant a rehearing in this case on the following grounds:

A. THE DECISION OF THE COURT ESTABLISHES AN UNCONSTITUTIONAL PRESUMPTION.

The Court's decision declares that the rationale used by the Court of Appeals [*Melton v. Bow*, 145 Ga. App. 272, 274 (1978)] in upholding the jury's verdict was not a proper statement of the law concerning the presumption of injury to reputation in cases of defamation per se. In setting forth an alternative basis to uphold the jury's verdict, this Court has established, for the first time, a conclusive presumption concerning the inference of injury to reputation authorized in cases of defamation per se. Specifically, as a necessary step in its decision to uphold the jury's verdict, this Court held:

> "The law *conclusively presumes* injury to his [Bow's] reputation. The evidence of witnesses that Bow has a good reputation could not disprove injury to his reputation." [Emphasis and bracketed matter added.]

The Petitioner is unaware of any previous such holding by an appellate court of this State. Moreover, in reaching this position the Court has created a constitutionally invalid presumption which should be corrected on rehearing.[1] In particular, the Petitioner believes that such holding is contrary to the dictates of the Due Process Clause of the Fourteenth Amendment in that it creates a presumption which is arbitrary and unreasonable.

Conclusive presumptions have long been disfavored under the Due Process Clause. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). In *Vlandis*, the United States Supreme Court struck as violative of the Due Process Clause a Connecticut statute which created a conclusive presumption that the status of a student as a non-resident continued throughout his attendance at a state-supported university. The test set forth in *Vlandis* is quite simple:

> "[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Id.* at 452.

This same test was used in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), to strike a conclusive presumption that school teachers who were four or five months pregnant were physically incapable of continuing their teaching duties. The instances are legion where conclusive presumptions, such as that which this Court has now established, have been struck as violative of the Due

[1] Petitioner recognizes that in normal circumstances constitutional questions may not be raised for the first time before this Court. However, as the Court's decision is the first time this theory of a conclusive presumption has been enunciated, it is proper at this time to raise the question of the constitutional validity of such presumption.

Process Clause. *See, e.g., Schlesinger v. Wisconsin*, 270 U.S. 230 (1926); *Hoeper v. Tax Commission*, 284 U.S. 206 (1931); *Heiner v. Donnan*, 285 U.S. 312 (1932); *Bell v. Burson*, 402 U.S. 535 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Turner v. Department of Employment Security*, 432 U.S. 44 (1975).

Here, the conclusive presumption of injury to reputation in cases of defamation per se is clearly not necessarily or universally true. This case is a perfect example of the absence of universality of the truth of the presumption. The Repondent's reputation simply was not injured by the statements of the Petitioner. Further, logically it cannot be said that any person's reputation is injured each time someone else calls him a liar or a thief.

Moreover, the conclusive presumption established by the Court in this case is not the only reasonable means of making the crucial determination in defamation cases concerning whether the plaintiff's reputation has been harmed. In defamation cases involving newspaper defendants, the United States Supreme Court has expressly held that compensatory awards must be supported by competent evidence concerning the injury to reputation. *Time, Inc. v. Firestone*, 424 U.S. 448, 459 (1976). In that case the United States Supreme Court recognized that such requirement displaced the former presumption of injury to reputation which arose upon proof of libel per se. *Id.* at 462, n.7. Thus, it clearly cannot be denied that there is another reasonable way for a defamation plaintiff to establish damage to his reputation.

B. THE DECISION OF THE COURT ESTABLISHES AN UNCONSTITUTIONAL CLASSIFICATION.

If left to stand, the conclusive presumption established

by the Court irrationally differentiates between defamation defendants who are part of the news media and those who are not. We have already shown that as a matter of federal constitutional law, recovery against media defendants in defamation cases, (including defamation per se cases), may only be had when the plaintiff shows by competent evidence that his reputation has in fact been injured. *Time, Inc. v. Firestone, supra* at 459. On the other hand, by virtue of this Court's decision here, a non-media defendant may be assessed damages in a defamation per se case without any showing of injury to the plaintiff's reputation. In fact, this Court holds that the non-media defendant is barred from disproving injury to the plaintiff's reputation. Such a disparity of treatment of defamation defendants does not comport with the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. Amend. XIV.

A rational basis must exist for such a distinction between defamation defendants. *See, Traylor v. Democratic Party of Georgia*, Supreme Court of Georgia, Case No. 33644 (Jun. 27, 1978). To state the test with respect to the distinction made is to answer the question. There is no rationality whatsoever in placing the burden of a conclusive presumption on a non-media defendant and yet permitting a media defendant to enjoy the benefit of requiring the plaintiff to show injury to his reputation by competent evidence. *Time, Inc. v. Firestone, supra* at 459.

C. THE DECISION OF THE COURT IS CONTRARY TO GEORGIA LAW.

The decision of the Court that the inference of injury to reputation authorized by Ga. Code § 105-702 in cases of defamation per se is a conclusive presumption is without foundation in Georgia law. Certain conclusive pre-

sumptions are set forth by statute. *E.g.* Ga. Code § 38-114. Conclusive presumptions are not, however, generally favored. *Id.; Cobb County Rural Electric Membership Corp. v. Board of Lights*, 211 Ga. 535, 539 (1955). In order for a conclusive presumption to arise, some fraud must have existed on the part of the party against whom the presumption is raised. Ga. Code § 38-116; *Cobb County Rural Membership Corp. v. Board of Lights, supra.* No fraud or deception as is contemplated by Ga. Code § 38-116 is involved here.

On the other hand, the presumption of injury with respect to a defamation per se plaintiff is described only as an inference. Ga. Code § 105-702. There is no hint in the Code that this inference is a conclusive presumption. Further, the Petitioner has not been able to find any reported case decision which has declared this inference of injury to reputation to be conclusive and irrebuttable. In fact, Ga. Code § 38-118 clearly provides that such an inference may be rebutted by proof.

D. CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that the aforementioned decision of this Court be reversed. Absent the conclusive presumption discussed herein, the Respondent has clearly failed by evidence or presumption to carry his burden of establishing injury to his reputation which is the only interest protected under Georgia law in defamation cases. *Spence v. Johnson*, 142 Ga. 267, 270 (1904). Without such injury the Respondent is not entitled to recover any award whatsoever from the Petitioner.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant Attorney General

/s/ DON A. LANGHAM
DON A. LANGHAM
First Assistant Attorney General

/s/ MICHAEL J. BOWERS
MICHAEL J. BOWERS
Senior Assistant Attorney General

/s/ JOHN C. JONES
JOHN C. JONES
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CERTIFICATE OF COUNSEL

I, MICHAEL J. BOWERS, of counsel for Petitioner in the foregoing action, do hereby certify that upon careful examination of the opinion of the Court, I believe that the Court has overlooked and failed to apply material facts and controlling authority more fully set forth in the foregoing Motion for Rehearing and that a proper application of said material facts and controlling authority would require a different judgment from that rendered.

This 14th day of July, 1978.

/s/ MICHAEL J. BOWERS
MICHAEL J. BOWERS
Senior Assistant Attorney General

CERTIFICATE OF SERVICE

I, MICHAEL J. BOWERS, do hereby certify that I have this date served a copy of the within and foregoing Motion for Rehearing, upon:

Mr. Dennis T. Cathey
Attorney for Respondent
Post Office Box 689
Cornelia, Georgia 30531

by depositing same in the United States Mail in a properly addressed envelope with adequate first class postage thereon.

This 14th day of July, 1978.

/s/ MICHAEL J. BOWERS
MICHAEL J. BOWERS
Senior Assistant Attorney General

APPENDIX C

APPENDIX C

33658. MELTON v. BOW.

JORDAN, Justice.

This court granted certiorari to review the decision of the Court of Appeals in *Melton v. Bow*, 145 Ga. App. 272 (243 SE2d 590) (1978), a case in which Michael L. Bow brought an action against Dr. Charles E. Melton for slander and libel. The jury returned a verdict for Bow in the amount of $200,000, and the Court of Appeals affirmed.

Dr. Melton had a limited privilege of communication of information about Bow in an investigation he made for the University of Georgia concerning the report made by Bow that he had received a W-2 form for earnings as a student-worker at the university at a time when he was no longer working there.

In order to claim a limited privilege under Code § 105-709, the communications must be made only to proper persons, and the privilege may not be used as a cloak for venting private malice. Code § 105-710; *Sheftall v. Central of Ga. R. Co.*, 123 Ga. 589 (5) (51 SE 646) (1905); *Ivins v. Louisville & Nashville R. Co.*, 37 Ga. App. 684 (8) (141 SE 423) (1927); *Veazy v. Blair*, 86 Ga. App. 721 (72 SE2d 481) (1952); *Camp v. Maddox*, 93 Ga. App. 646, 651 (92 SE2d 581) (1956).

The evidence showed that Dr. Melton made defamatory remarks and published defamatory reports about Bow to numerous persons not involved in any investigation, and that he continued to make and publish such defamatory statements after the investigation by the university security department had disclosed that the discrepancy in the accounts had been caused by an embezzler

in Dr. Melton's department. There was no evidence that Bow was guilty of any of the numerous misdeeds with which he was charged by Dr. Melton. We concur in the view of the Court of Appeals that the evidence authorized a finding that the publications were made to persons not concerned with the investigation, and that the circumstances amply authorized a finding of malice.

This court in granting certiorari was concerned with Division 3 of the opinion of the Court of Appeals, in which it was held: "Appellant [Dr. Melton] also contends that the verdict is without evidentiary support because the testimony of appellee's own witnesses showed that his reputation had not been damaged. One of Bow's witnesses twice said, '. . . he has an outstanding reputation.' This testimony, appellant argues, rebutted the presumption of damages which attached upon proof of the defamatory statements and placed on Bow the burden of proving actual damages. Assuming appellant is correct about the effect of that testimony, we still cannot find the verdict to be unsupported by the evidence. Another witness testified that when Dr. Melton accused Bow of criminal activity, '. . . it made me wonder about him.' Applying the any evidence rule stated above, we are constrained to hold in favor of the jury's verdict."

Dr. Melton in his petition for certiorari strongly argues that the testimony as to the good reputation of Bow refuted the presumption of injury to him, and that there was no evidence of injury to Bow's reputation authorizing the recovery of damages.

We reject this argument of Dr. Melton, but feel that the quoted paragraph of the opinion of the Court of Appeals is a misleading statement on the law applicable to the proof of damages in a case where false statements

are made which are per se slanderous and libelous. Dr. Melton, by oral and written statements, accused Bow of the theft of hotplates from the chemistry laboratory where he had worked. He also called Bow a liar, stated that Bow was in trouble with the IRS, and made many other derogatory remarks about him.

To impute the crime of theft to a person is actionable per se without proof of special damages. *Roberts v. Ramsey*, 86 Ga. 432 (12 SE 644) (1890); *Weatherholt v. Howard*, 143 Ga. 41 (84 SE 119) (1914); *Harrison v. Pool*, 24 Ga. App. 587 (101 SE 765) (1919); *Ingram v. Kendrick*, 48 Ga. App. 278 (172 SE 815) (1933); *Atlanta Journal Co. v. Doyal*, 82 Ga. App. 321, 331 (4) (60 SE2d 802) (1950); *Duchess Chenilles, Inc. v. Masters*, 84 Ga. App. 822, 829 (67 SE2d 600) (1951); *Davis v. Macon Telegraph Pub. Co.*, 93 Ga. App. 633 (2) (92 SE2d 619) (1956).

Bow had no burden to prove that his reputation had been damaged by the statements imputing a crime to him. The law infers injury to his reputation. The evidence of witnesses that Bow has a good reputation could not disprove injury to his reputation. This evidence was relevant on the issue of the amount of damages, since libelous statements are certainly more injurious to the reputation of a person of good reputation than to a person of bad reputation. *Augusta Chronicle Pub. Co. v. Arrington*, 42 Ga. App. 746 (3) (157 SE 394) (1930).

We agree with the determination of the Court of Appeals that the evidence authorized the jury verdict, but this finding should not have been placed solely on the testimony of a witness that the false statements "made her wonder" about Bow.

After further consideration of the evidence in the case, we are of the opinion that the verdict was not excessive.[1]

Judgment affirmed. All the Justices concur.

ARGUED JUNE 19, 1978—DECIDED JULY 6, 1978—

REHEARING DENIED JULY 21, 1978.

Certiorari to Court of Appeals of Georgia—145 Ga. App. 272 (243 SE2d 590).

Arthur K. Bolton, Attorney General, Michael J. Bowers, Senior Assistant Attorney General, for appellant.

Dennis T. Cathey, Edward E. Strain, III, for appellee.

[1] Under a stipulation between counsel the jury returned its verdict in one sum so that the amount of compensatory damages and the amount of punitive damages the jury may have awarded cannot be ascertained.

APPENDIX D

APPENDIX D

55022. MELTON v. BOW

SHULMAN, Judge.

Bow brought suit against Melton for slander and libel, alleging that Melton had made certain defamatory remarks. Melton defended by denying making certain of the statements and claiming privilege as to others. Bow had been employed under a work-study program by the University of Georgia chemistry department during a period in which Dr. Melton was the head of that department. Over a year after Bow's departure from the university, a controversy arose over certain paychecks. A subsequent criminal investigation conducted by university police resulted in the forgery conviction of a chemistry department employee who had caused checks to be issued in the names of ex-employees (including appellee's name) and had then forged indorsements thereon. Bow had no connection with the forgery scheme. This case concerns statements made by Melton during and after the period of the criminal investigation and in the course of an independent investigation Melton purported to conduct.

1. At the close of the plaintiff's case, appellant moved for a directed verdict, contending that malice had not been shown. He enumerates the denial of that motion as error.

Appellant argues, correctly, that when a prima facie showing of privilege has been made, the burden is on the plaintiff to prove actual malice. *WSAV-TV v. Baxter,* 119 Ga. App. 185 (166 SE2d 416). He contends that there had been no evidence of malice.

Appellee argued at trial that a jury question had been

raised by the evidence and the trial judge agreed; so do we.

"It is urged that it must be proven that the libelous publication was made with actual malice or with reckless disregard of the truth. [Cits.] But such proof is supplied when the totality of the circumstances suggests malice, and even though the publisher may testify that he acted in good faith (or without malice) 'the facts, all the facts, are to be considered in arriving at the truth of his real motive.' [Cits.] It is never expected that the publisher will *admit his own malice*. Likewise it would impose too onerous a burden on plaintiff to expect him to bring forth a witness to testify that he overheard the publisher say that he was actuated by malice. *The circumstances, all of the circumstances*, must be considered, and from those circumstances, despite the publisher's sworn testimony to the contrary, a jury may properly conclude the publisher was motivated by malice." *Montgomery v. Pacific & Southern Co.*, 131 Ga. App. 712, 716-17 (206 SE2d 631), affd. 233 Ga. 175 (210 SE2d 714). Considering all the circumstances of this case, including the persons to whom the defamatory statements were made, the occasions on which they were made, and the manner in which they were published, the jury was authorized to find the existence of actual malice. In addition, ". . . at the very least, . . . there was a 'reckless disregard of the truth' which is the equivalent of malice." Id., p. 717. There was no error in denying the motion for a directed verdict.

2. Following the verdict for appellee, Dr. Melton filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. The denial of that motion is enumerated as error.

A. Citing the decision in *Walter v. Davidson*, 214 Ga.

187 (104 SE2d 113), appellant contends that there was no publication of his remarks because he made them in the course of a good-faith investigation to persons who were properly concerned with the progress of the investigation. However, the fact that the persons to whom he communicated his statements concerning Bow were university employees does not demand a finding that there was no publication. "Certainly a janitor is an employee and there may be many other employees, all without a duty or authority to control student conduct, and obviously slanderous statements about a student stated to such employees would be publication in contemplation of the law." *Walter v. Davidson*, supra, p. 191. The evidence in this case supports a finding that Dr. Melton's remarks were made to persons "without a duty or authority to control" conduct of the kind which was properly the subject of the investigation he purported to be making. The evidence, therefore, supported a finding of publication of the defamatory statements.

B. In his motion for judgment notwithstanding the verdict, appellant again raised the issue of malice. That argument is answered in Division 1 of this opinion.

3. Appellant contends that the verdict was not supported by the evidence. As noted in Divisions 2 and 3, there was evidence to support both the jury's rejection of appellant's defense of privilege and its finding of malice in the making of the defamatory statements. "In passing on the sufficiency of the evidence to support the verdict, the appellate courts are to afford the evidence that view which is most favorable to the appellee and which is designed to uphold the verdict. All conflicts must be rendered against the appellant, and if there is any evidence to support the verdict it must be affirmed." *Mundy v.*

Cincinnati Ins. Co., 141 Ga. App. 106 (8) (232 SE2d 621).

Appellant also contends that the verdict is without evidentiary support because the testimony of appellee's own witnesses showed that his reputation had not been damaged. One of Bow's witnesses twice said, ". . . he has an outstanding reputation." This testimony, appellant argues, rebutted the presumption of damages which attached upon proof of the defamatory statements and placed on Bow the burden of proving actual damages. Assuming appellant is correct about the effect of that testimony, we still cannot find the verdict to be unsupported by the evidence. Another witness testified that when Dr. Melton accused Bow of criminal activity, ". . . it made me wonder about him." Applying the any evidence rule stated above, we are constrained to hold in favor of the jury's verdict.

4. The jury returned a verdict against appellant in the amount of $200,000. Appellant contends that the verdict was excessive.

" 'When a case comes before this court, after the refusal of a new trial by the presiding judge, it comes not only with the presumption in favor of the verdict, but also stamped with the approval of the judge who tried the case, and where no prejudice or bias or corrupt means in reaching the verdict appear, we are not authorized to set it aside as being excessive. [Cits.]' " *Jones v. Spindel*, 128 Ga. App. 88 (2), 96 (196 SE2d 22). "This court does not have the broad discretionary powers invested in trial courts to set aside verdicts, and where the trial court before whom the witnesses appeared had the opportunity of personally observing the witnesses, including the plaintiff on the stand, has approved the verdict, this court is without power to interfere unless it is clear from the record that the verdict of the jury was prejudiced or biased or was procured by corrupt means. [Cit.]" *Kiker v. Davis*, 103 Ga. App. 289, 290 (118 SE2d 861).

In view of the allegations that Dr. Melton abused his position of authority in a wanton and reckless manner to slander appellee, which allegations were supported by the evidence, and in the absence of any showing of prejudice or bias or corrupt means of reaching the verdict or any abuse of the trial court's discretion in refusing to overturn the verdict, we cannot say the verdict was excessive as a matter of law.

5. Appellant moved for summary judgment but did not appeal the denial of his motion until this appeal. Although the rule is that, after trial and verdict, it is too late to appeal the denial of summary judgment (*Phillips v. Abel*, 141 Ga. App. 291 (233 SE2d 384)) appellant argues that application of that rule would be unfair in this case because of prior decisions of this court on which he relied in timing his appeal from the denial of the motion. The motion was denied in July 1976. In February of that year, this court held that a denial of summary judgment could be reviewed ". . . without the necessity of making application for interlocutory appeal where there is a final judgment which is the basis of the appeal." *Ga. Motor Club v. First Nat. Bank &c. Co.*, 137 Ga. App. 521, 525 (224 SE2d 498), disapproved in *Marietta Yamaha, Inc. v. Thomas*, 237 Ga. 840 (229 SE2d 753). Appellant asserts that, in reliance on that decision, he chose to delay appeal of the denial. After his time for applying for interlocutory appeal had passed, in September 1976, this court declared that after trial, an enumeration of error complaining of the denial of summary judgment is nonmeritorious. *Mullinax v. Singleton*, 139 Ga. App. 704 (229 SE2d 518).

Although there has been some confusion about the timing and procedure for appealing the denial of summary judgment (see *Mahler v. Paquin*, 143 Ga. App. 773 (240 SE2d 185)), the rule set forth in *Mullinax* has been followed since it was announced by the Supreme Court in *Hill v. Willis*, 224 Ga. 263 (2) (161 SE2d 281). "A motion for a summary judgment is somewhat analogous to a motion for a nonsuit, for if, after being overruled, even if done improperly, *all* the evidence shows that a verdict for the opposing party is authorized, the error is harmless. The purpose of permitting summary judgments is to dispose of unnecessary trials and not to upset a verdict authorized by the evidence merely because at a previous stage of the case a finding may not have been authorized in accordance with such verdict." Id., p. 266. The Supreme Court went on to discuss the statutory changes which had affected the reviewability of denials of summary judgment, and noted that, even if the denial is subject to review after verdict, ". . . yet, like a nonsuit, all the evidence adduced before the jury will be considered in reviewing such an order, and, if the verdict was authorized, the prior order overruling the motion for summary judgment will be affirmed as constituting, at most, harmless error." Id., p. 267. As we have held in preceding divisions that the verdict was authorized by the evidence, we hold that any error in denying appellant's motion for summary judgment was harmless and not grounds for reversal.

Judgment affirmed. Bell, C. J., and Birdsong, J., concur.

ARGUED JANUARY 16, 1978—DECIDED FEBRUARY 21, 1978

—REHEARING DENIED MARCH 14, 1978—

CERT. APPLIED FOR.

Slander, etc. Madison Superior Court. Before Judge Burruss.

Arthur K. Bolton, Attorney General, John C. Jones, Staff Assistant Attorney General, for appellant.

Cathey & Strain, Dennis T. Cathey, for appellee.